



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX  
CALIFORNIA

July 29, 2014

Bruce Harter, Ph.D.  
Superintendent  
West Contra Costa Unified School District  
1108 Bissell Avenue,  
Richmond, California 94801

(In reply, please refer to case no. 09-13-1251.)

Dear Superintendent Harter:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the West Contra Costa Unified School District (District). OCR investigated whether the District discriminated against the Student based on disability.<sup>1</sup> Specifically, OCR investigated whether the District failed to:

1. provide the Student with a free, appropriate public education (FAPE) by not implementing the Student's Behavior Support Plan (BSP);
2. provide the Student with a FAPE by not evaluating her in all suspected areas of disability; and,
3. respond promptly and equitably to allegations of peer-to-peer harassment of the Student based on disability.

OCR investigated these allegations under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), and their implementing regulations. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. Title II prohibits discrimination based on disability by public education entities. The District receives funds from the Department and is a public education entity, and therefore is subject to Section 504 and Title II and their implementing regulations.

OCR gathered evidence through interviews with the Student's parent, as well as school administrators, teachers, and staff. OCR also reviewed documents provided by the parent and the District. For the reasons explained here, OCR determined that there was insufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with respect to issue number one. However, OCR did find sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with respect to issues two and three.

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<sup>1</sup> OCR notified the District of the Student's identity when the investigation began. OCR is withholding the Student's name from this letter to protect the Student's privacy.

## Background

The Student was thirteen years old at the beginning of the 2012-2013 school year and turned fourteen years old during the year. She was in the eighth grade. The Student had been diagnosed with various disabilities over the years, including ADHD, developmental delay, and other cognitive disabilities. According to her IEP, the primary disability that qualified her for special education was a specific learning disability. Her secondary disability was a speech or language impairment. The Student also had a history of behavior and other challenges. The Student was in general education classes with resource specialist program (RSP) services at School #1 until she moved to a new school (School #2) in December 2012, where she was placed in a special day class. During OCR's investigation, the Student moved out of the District and now lives in a nearby district.

*Issue 1: Did the District fail to provide the Student with a FAPE by not implementing the Student's BSP?*

## Legal Standard

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a FAPE to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

In the context of providing a FAPE under Section 504, the regulations, at 34 C.F.R. § 104.3(j), define an individual with a disability as any person who has a physical or mental impairment which substantially limits a major life activity. Under 34 C.F.R. § 104.3(j)(2)(ii), major life activities include learning. The definition of disability under the Title II regulations, at 28 C.F.R § 35.104, is substantially the same. It is important to note that a student may have a physical or mental disorder that qualifies the student as a disabled individual requiring services under Section 504 and Title II even though the disorder does not meet the eligibility criteria for services under the IDEA. The IDEA applies only to students who have specifically identified conditions. Section 504 and Title II apply to any student who has a physical or mental impairment that substantially limits a major life activity.

## Factual Findings

### *Behavior Support Plan*

The Student's IEP team determined that her behavior was impeding her learning and it developed a BSP as part of her October XX, 2012, IEP. The plan noted that the Student was often off task, talking and in verbal conflict with peers, and used threatening and inappropriate language. The behavior plan explained that the Student acted out to seek attention and protest or escape work and authority. According to the plan, staff were going to teach her to identify her emotions and develop positive ways to gain attention as well as to learn other techniques to calm herself, or ask for help when she was upset. Staff were to teach the Student to "stop, think and replace" to reduce bad behavior. The Student's behavior plan included giving the Student: time to process and comply with requests, more time with difficult work, limited choices, calm and neutral interactions, verbal and nonverbal cues, a place to cool down, and time away.

The Student's BSP also required continuous summaries on positive behavior and use of replacement behaviors to be completed daily by the teacher and her parent. The behavior plan and IEP meeting notes state that the principal informed the parent at their March XX, 2013, meeting that the Student was still potentially subject to discipline including suspension.

The Complainant alleged that the School disciplined the Student and did not implement her behavior plan during the 2012-2013 school year. As examples, the Complainant provided OCR with information about several instances when the Student was disciplined for misbehavior. OCR found that the Student was disciplined for various behaviors during 2012-2013, including four suspensions for a total of seven days for behavior ranging from defiance and obscenity to threats.

### *Implementation of Student's Behavior Plan*

The District provided OCR with documentation of the implementation of the Student's behavior plan, including daily summaries of the Student's behavior in the classroom and how they were addressed by the staff using the strategies in the BSP. In addition, OCR interviewed the Student's teacher and aide who were able to clearly explain how the teacher implemented the behavior plan. The teacher's explanation was consistent with the behavior plan's requirements. The Complainant did not describe any specific instances where the BSP was not implemented that OCR could verify.

## Analysis

OCR found that the Student's teacher was familiar with the provisions of the Student's BSP, had received a copy, and could effectively describe how she implemented the plan. Documentation provided by the District supported the teacher's descriptions of implementing the Student's BSP. Therefore, OCR concluded that the Student's behavior plan was implemented. The evidence did not indicate that the misconduct for which the Student was disciplined was the result of any failure to implement the Student's BSP, and the discipline was consistent with the behavior plan. In addition, although discipline documents showed that the Student was suspended for seven

days during the school-year, and received several other detentions and warnings, generally suspensions totally less than 10 days are not considered to be a significant change in placement triggering a manifestation determination meeting for the Student. Therefore, OCR did not find sufficient evidence to support a finding of non-compliance with Section 504 and Title II with respect to this issue.

*Issue 2: Did the District evaluate the Student for all suspected areas of disability?*

### Legal Standard

Section 104.35(a) regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. Under § 104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used. Under subsection (c), placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

### Factual Findings

A review of the Student's IEPs, and various correspondence between the parent, District, and school staff showed that, as discussed below, the parent raised repeated concerns about name calling and bullying of the Student, as well as her various needs. Staff also raised significant concerns about the Student's behavioral challenges which included verbal outbursts, physical aggression, and other inappropriate and serious misbehavior. The Student's file included information regarding additional significant concerns about low self-esteem and other challenges the Student faced at school and at home, including issues that could possibly be indicators of emotional problems and/or suicidal thoughts in a middle school-aged student.

In the Student's March X, 2012 IEP meeting, the parent reported that the Student was making threats of suicide. A Designated Instructional Services (DIS) referral form dated March XX, 2012, said the Student had made several suicide threats and listed the school psychologist and another staff member as referring the Student for counseling. IEP notes from a meeting on March XX, 2012, a meeting the school psychologist is listed as having attended, also referred to the recommendation for DIS counseling for the Student.

After the above mentioned IEP meetings and DIS referral, the District conducted a triennial assessment of the Student one year early, on April XX, 2012. The school psychologist present at the March XX, 2012, IEP conducted the assessment and told OCR that the assessment focused on a suspected possible intellectual disability. At the time, the Student was not attending school

so the assessment was limited to one day of observations for about three hours, mainly in the school psychologist's office. The school psychologist did not talk to any of the Student's teachers, observe the Student in class or anywhere other than in her own office and in the hallway. Although the school psychologist told OCR that she frequently assesses students in relation to possible emotional disturbance, she was not asked to assess the Student regarding her suicide ideation and did not assess the Student for emotional disturbance. She could not remember an IEP discussion of suicidal ideation and the Student or the DIS referral, and said she did not conduct such an assessment because she saw no reason to assess the Student related to these issues.

### Analysis

OCR's investigation also showed that the District did not comply with its responsibilities under the Section 504 regulations at 34 C.F.R. § 104.35. District and school staff were aware of the Student's threats of suicide, low self-esteem, and other significant emotional challenges. However, the only referral made was for DIS counseling on March XX, 2012, prior to the April XX, 2012 triennial assessment. The District did not conduct a comprehensive psycho-educational assessment, to evaluate the nature and extent of the Student's psychological and emotional issues, despite information that should have prompted such an assessment. It made the DIS referral without any assessment information about the appropriateness of such services. The Student's triennial assessment was inadequate, especially given the Student's suicidal threats and related social/emotional concerns. The District acknowledged that it was limited to an assessment of learning disabilities. The District's failure to fully assess the Student in all areas of suspected disability as required by 34 C.F.R. § 104.35 resulted in a denial of FAPE and noncompliance with Section 504 and Title II with respect to this issue.

*Issue 3: Did the District respond promptly and equitably to allegations of peer-to-peer harassment of the Student based on disability?*

### Legal Standard

The regulations implementing Section 504, at 34 C.F.R. § 104.4(a) and (b), prohibit discrimination based on disability by recipients of Federal financial assistance. The Title II regulations, at 28 C.F.R. § 35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. School districts are responsible under Section 504, Title II and the regulations for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

Under Section 504, Title II, and the regulations, once a school district has notice of possible disability-based harassment between students, it is responsible for determining what occurred and responding appropriately. The district is not responsible for the actions of a harassing student, but rather for its own discrimination in failing to respond adequately. A school district may violate Section 504, Title II and the regulations if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the district knew or reasonably should have known about the harassment; and (3)

the district fails to take appropriate responsive action. These steps are the district's responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the district must conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred. If harassment is found, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment on the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the district does not tolerate harassment and will be responsive to any student reports of harassment. The district also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

In addition, the Section 504 and Title II regulations establish procedural requirements that are important for the prevention and correction of disability discrimination, including harassment. These requirements include issuance of notice that disability discrimination is prohibited (34 C.F.R. § 104.8 and 28 C.F.R. § 35.106) and adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of disability discrimination (34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b)). The regulations also require that recipients/public entities designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance (34 C.F.R. § 104.7(a) and 28 C.F.R. § 35.107(a)).

In determining whether a hostile environment based on disability has been created, OCR evaluates whether or not the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the district's program. OCR examines all the circumstances, including: the type of harassment (e.g. whether it was verbal or physical); the frequency and severity of the conduct; the nature of the student's disability; the age and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the district; and other relevant factors.

OCR examines a number of factors in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students, parents of elementary and secondary school students, and employees, including where to file complaints; application of the procedure to complaints alleging harassment by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;

designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any harassment and to correct its discriminatory effects.

### Factual Findings

#### *Uniform Complaint Procedures (UCP) for Complaints of Discrimination*

The District's 2012-2013 Student handbook stated that the District used its UCP to address complaints alleging unlawful discrimination based on disability as well as other characteristics such as race, color, national origin, age, and gender. The handbook explained the UCP process for addressing complaints of discrimination. Specifically, the handbook explained that within fifteen days of the filing of a complaint, the District would initiate an informal resolution process. In the informal process, the "principal/department head [would] conduct a meeting with all parties" to discuss and resolve the issues with the "compliance officer/designee acting as an impartial chairperson." If the complaint was not resolved through this informal process, a formal investigation would begin and, within ten days, the "compliance officer [would] hold an investigative meeting with all parties and their representatives with the compliance officer/designee acting as impartial chairperson." Within sixty days of receiving the complaint, the compliance officer was required to prepare a written report of the finding and decision. The complainant could appeal the decision to the Board of Education. The District's final report was to include findings of fact based on the evidence gathered, conclusions of law, disposition of the complaint and rationale, corrective actions if any are warranted, and notice of the right to and process for appeal.

#### *Parent Complaints*

##### Student/Complainant History

The Student's IEP meeting notes and other documents showed that during the spring of 2012, the parent raised concerns about bullying of the Student and the Student's safety on several occasions. The District told OCR that these complaints reflected a pattern of repeated accusations by the parent that were unfounded. The documents did not indicate whether the parent's concerns were specific to disability based bullying, or other generalized bullying of the Student.

In the fall of 2012, on October XX, 2012, the parent emailed a District special education administrator regarding further concerns about harassment she alleged the Student was experiencing. The email's subject line referred specifically to staff and students at the Student's school (School #1) who "continue to harass" the parent and Student "because of her disability." The email then described a specific incident in which the parent claimed the Student was threatened by a group of students, and the parent explained why she believed the school's response was inadequate. The email also complained that the principal of the school had enabled an environment which could harm the Student and alleged that other students were calling her daughter a "snitch," that she was subjected to "daily" harassment, and the school was punishing the victim, her daughter.

In response, a District administrator initially offered to meet with the parent, and then seemed to suggest a full IEP team meeting. The parent questioned why the administrator was proposing a full IEP team meeting, and asked for clarification. The District administrator did not refer the parent's concerns regarding disability harassment and discrimination to the District's uniform complaint process. The District administrator told OCR she believed she looked into the complaint, but could not remember specifically how. She did not interview the Student or any other students allegedly involved, but told OCR she believed that she talked to a teacher and school administrators and they told her there was nothing to the allegations. The District administrator did not provide any written notice to the parent regarding her determinations on the complaint of disability discrimination.

On November X, 2012 the parent emailed the District administrator again. The title of the email was "[b]ullying continue" and the email stated that the parent might have to keep the Student home, and wanted to discuss home study. On November X, 2012, the parent emailed again and requested home instruction for the Student until a meeting could be held, "since she is not safe" at school. An IEP meeting was held on November XX, 2012, and the IEP team agreed that the Student would move to a new school (School #2). The Student began attending School #2 soon thereafter.

In subsequent IEP meetings, correspondence, and documents, the issue of bullying continued to arise. While the Student was attending School #2, the parent complained of further bullying and name calling. These complaints were not specific about whether the bullying was disability based. The principal of School #2 responded repeatedly to the parent regarding her concerns. For example, a February X, 2013, letter from the parent raised concerns about general bullying of the Student, and the principal responded just several days later in a letter dated February X, 2013. The principal's February X, 2013, letter described the investigation the school conducted, including interviewing the Student and accused students. The letter also stated that one of the accused students was disciplined, and the principal explained the school's actions related to the Student and other concerns the parent raised. .

### Analysis

As stated above, once a school district has notice of disability-based peer harassment, it has a duty to promptly conduct an inquiry designed to reliably determine what occurred and, if disability-based harassment was found, take steps to stop the harassment and prevent it from recurring, and to remedy the effects of the harassment on the Student. In addition, under the Section 504 and Title II regulations, school districts have a duty to adopt and implement procedures that are consistent with due process standards and that provide for the prompt and equitable resolution of complaints alleging discrimination based on disability.

OCR found that the Student's parent repeatedly complained to District and school staff regarding alleged bullying. Although many of the parent's complaints of bullying did not specifically make reference to disability, the Complainant's October XX, 2012 email clearly did. Despite this notice of alleged disability based harassment, the District did not initiate its uniform complaint procedure that was specifically identified as the District's process for resolving complaints of discrimination, or otherwise conduct an inquiry to reliably determine what

occurred and take effective remedial action. Although the Student moved schools within the District in the winter of 2012, the parent did not believe the matter was adequately resolved, yet the District did not proceed to a formal investigation, and never issued a report of findings as required under its UCP. Without any such findings, the parent and Student had no way to assess whether the District's had taken any actions to address her discrimination concerns, nor could the parent appeal the outcome. Therefore, the District did not provide a prompt and equitable grievance procedure in response to the Complainant's emails alleging disability harassment of the Student, and the District was not in compliance with Section 504 and Title II with respect to this issue.

In addition, OCR's review showed that the District's UCP discrimination complaint process requires all of the parties to meet together for informal resolution. If a complaint is not resolved informally, the District's written materials require an investigative meeting with all the parties as part of the formal resolution process as well. Although holding a meeting with all parties to a complaint may be appropriate in some circumstances where such a meeting is voluntary and the parties consent, it cannot be required. Further, such meetings are normally inappropriate in cases of discriminatory harassment, and could exacerbate or create a hostile environment for a student. To conduct an equitable investigation the District compliance officer/designee should gather information from the parties independently, and collect other relevant information, to investigate the allegations and make a determination. OCR therefore concluded that the District's process, as described in written materials, did not provide for a prompt and equitable resolution of complaints alleging discrimination based on disability; the District was therefore not in compliance with Section 504 and Title II and the regulations in this regard.

### Conclusion

For the reasons explained above, OCR determined that there is sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with respect to issues two and three, and insufficient evidence of noncompliance with respect to issue one. After OCR notified the District of its conclusions, without admitting to any violation of law, the District entered into a signed agreement (Agreement) that, when fully implemented, will resolve the issues in this complaint. Pursuant to the Agreement, the District will: 1) issue written guidance and conduct training on responding promptly and equitably to complaints of harassment based on disability<sup>2</sup>; 2) conduct training for site administrators and other appropriate staff regarding providing a FAPE for students with disabilities, including the process for identification, referral, and assessment of students with suspected disabilities; 3) offer to conduct a complete psycho-educational assessment of the Student; and, 4) if the Student's assessment is conducted and finds that the Student has additional areas of social/emotional disability that should have been identified previously, the District will offer to provide compensatory education for academic

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<sup>2</sup> Prior to the resolution of this case, the District was in the process of revising its procedures for responding to complaints of discriminatory harassment, as part of the resolution of OCR compliance review 09-10-5002. Based on the agreement between the District and OCR in that case, the District developed a new administrative regulation, AR 5145.3, which was reviewed by OCR and which covers complaints of sex and disability harassment and other discriminatory harassment. Therefore, the agreement in this case does not also include revisions of the District's policies.

deficits incurred as a result.<sup>3</sup> The signed Agreement is enclosed with this letter. OCR will monitor the District's implementation of the Agreement.

This concludes the investigation portion of this complaint. This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The parent (complainant) is being notified concurrently.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

OCR would like to thank the District for its cooperation in resolving this case and specifically, we would like to thank counsel for the District, Melissa Phung and Shaw Olson Brown, for their assistance. If you have any questions, please contact OCR investigator Nancy Sablan, at (415) 486-5549 or [Nancy.F.Sablan@ed.gov](mailto:Nancy.F.Sablan@ed.gov), or OCR staff attorney Brian Lambert, at (415) 486-5524 or [Brian.Lambert@ed.gov](mailto:Brian.Lambert@ed.gov).

Sincerely,

/s/

Zachary Pelchat  
Team Leader

Enclosure

cc: Melissa Phung, Associate, Fagen Friedman & Fulfrost LLP (email)  
Shawn Olson Brown, Partner, Fagen Friedman & Fulfrost LLP (email)

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<sup>3</sup> The Student moved out of the District prior to the conclusion of OCR's investigation. Therefore, the individual remedies for the Student reflect the fact that the Student is no longer attending school in the District.